

the appropriate review in connection therewith has been completed; and

WHEREAS, on May 10, 1990 (Cal. No. 51), the Board held a public hearing on the Company's petition for a telecommunications franchise which was a full public proceeding affording due process in compliance with the requirements of Chapter 14 of the City Charter, at which hearing the Board took certain actions, including directing the Director to commence negotiations with the Company, which negotiations have been completed; and

WHEREAS, the Director, on behalf of the Board of Estimate, reviewed the proposed action for its potential environmental impacts and determined, as evidenced by his Memorandum to File, dated May 10, 1990, that this action is properly classified as a "Type II" action, pursuant to Executive Order 91, City Environmental Review, August 24, 1977.

WHEREAS, the Director, behalf of the Board of Estimate, determined, as evidenced in its letter to Douglas Bradbury, Esq., dated June 13, 1990, that the proposed franchise would have no lane use impacts and that review pursuant to Section 197c of the Charter would not be necessary; and

WHEREAS, the Board made inquiry as to the money value of the proposed nonexclusive franchise granted pursuant to this Agreement and the adequacy of the compensation proposed to be paid therefor; and

WHEREAS, the Board embodied in this Agreement the results of said inquiry and set the 7th day of June, 1990, for a public hearing thereon in accordance with the requirements of Chapter 14 of the City Charter, which hearing was closed on the 21st day of June, 1990; and

WHEREAS, said hearing was a full public proceeding affording due process at which the Board reviewed the Company's financial, legal and technical ability to carry out its obligations pursuant to this Agreement; reviewed the Company's plan for constructing, operating, maintaining and upgrading the System (as defined in Section 1 hereof); and determined that this Agreement granting the Company a nonexclusive franchise complies with all applicable laws and regulations; and

WHEREAS, the City intends to exercise the full scope of its municipal powers, including both its police power and contracting authority, to promote the public interest, to protect the health, safety, and welfare of its citizens, and to assure the widespread availability of telecommunication services to enhance commerce in the City; and, in pursuit of these goals, among other

purposes, desires to maximize the availability of such telecommunications services and to develop innovative uses by the City and its institutions of such services; and

NOW, THEREFORE, in consideration of the foregoing clauses, which clauses are hereby made a part of this Agreement, the mutual covenants and agreements herein contained, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereby covenant and agree as follows:

SECTION 1 -- DEFINED TERMS

For purposes of this Agreement, the following terms, phrases, words, and their derivatives shall have the meanings set forth in this Section, unless the context clearly indicates that another meaning is intended.

1.1 "Additional Backbone" means any Backbone added to the System in the Franchise Area other than the Initial Backbone.

1.2 "Agreement" means this agreement, together with the Appendices attached hereto and all amendments, modifications or renewals thereof.

1.3 "Backbone" means the Fiber in the Streets not extending laterally to serve a Customer.

1.4 "Board" means the Board of Estimate of the City of New York, its designee, or any successor thereto.

1.5 "Brooklyn Backbone" means the Backbone from the Company's Backbone in the Lower Manhattan Franchise Area to a location in the IRT subway station below the Borough Hall in Brooklyn, as depicted approximately in Appendix A.

1.6 "Bronx Backbone" means the Backbone from a location adjacent to the proposed International Trade Center in Harlem to a location in the Street adjacent to the Bronx County Courthouse, depicted approximately on Appendix B-1.

1.7 "Cable Service" means: (a) the one-way transmission to subscribers of video programming or other programming service and (b) subscriber interaction, if any, which is required for the selection of such video programming or other programming service, as defined in the Federal Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521-611 (1982 and Supp. IV 1987), 47 C.F.R. §§ 761, et seq (1989).

1.8 "City" means the City of New York or, as appropriate in the case of specific provisions of this Agreement, any board, bureau, authority, agency, commission, department of, or any other entity of the City of New York, or any authorized officer, official, employee, or agent thereof, or any successor thereto.

1.9 "City Fiber" means the strands of Fiber that are installed for and are owned by the City pursuant to Section 8.1.

1.10 "City Network" means the City Fiber and the "Drop Cables", as defined in Section 2.4.3(c)(2). The Company's obligations with respect to the City Network are more fully described in Appendix C.

1.11 "Company" means Metropolitan Fiber Systems of New York, Inc., a corporation organized and existing under the laws of the State of Delaware, whose principal place of business is located at 50 Broadway, New York, New York 10004.

1.12 "Comptroller" means the Comptroller of the City, the Comptroller's designee, or any successor in function to the Comptroller.

1.13 "Control" or "Controlling Interest" means actual working control in whatever manner exercised, including, without limitation, working control through ownership, management, debt

instruments or negative control (meaning the power to veto decisions regarding operations, as the case may be, of the System or of the Company. A rebuttable presumption of the existence of control or a controlling interest shall arise from the beneficial ownership, directly or indirectly, by any Person or group of Persons acting in concert (other than underwriters during the period in which they are offering securities to the public) of more than twenty percent (20%) of any Person (which Person or group of Persons is hereinafter referred to as "Controlling Person"). "Control" or "Controlling Interest" as used herein may be held simultaneously by more than one Person or group of Persons. The terms "Controlling Interest" or "Control" shall only apply to Persons in the "direct chain of ownership" running from the Company to Peter Kiewit Sons', Inc. ("Kiewit") and shall include the Kiewit stockholders. A Person in the "direct chain of ownership" shall include any corporation that is both (a) a direct or indirect subsidiary of Kiewit, and (b) the direct or indirect parent of the Company. A change in Control of management shall mean a change in one half or more of the members of the Board of Directors or a substantial replacement of the executive officers of an entity at one point in time in conjunction with a contemporaneous transfer of 5% or more of voting stock of such entity. A change of control shall not be deemed to have occurred if caused directly or indirectly by the following circumstances: (a) any transfer of voting shares of the Company or any entity in the direct chain of ownership from

the Company to Kiewit so long as such transfer is to Kiewit or any subsidiary of Kiewit which is 80% or more owned, directly or indirectly, by Kiewit, or (b) any conveyance of Kiewit voting or nonvoting common stock by any Kiewit shareholder to Kiewit.

1.14 "Customer" means any Person lawfully receiving any Service provided by the Company by means of the System.

1.15 "Director" means the Director of the Bureau of Franchises of the Board, the Director's designee, or any successor in function to the Director.

1.16 "Effective Date" means the date on which this Agreement shall take effect, which is the date the Mayor executes this Agreement.

1.17 "FCC" means the Federal Communications Commission or any successor thereto.

1.18 "Fiber" means fiber optic telecommunications cable.

1.19 "Franchise Area" means the Boroughs of Manhattan (exclusive of the area coinciding with the boundaries of Community Board No. 1 which is the subject of the Franchise Agreement, between the City and the Company, effective May 1, 1990), the Bronx, Brooklyn and Queens.

1.20 (a) "Gross Revenue from Leases and Sales" means all revenue, as determined in accordance with GAAP, which is received directly or indirectly by the Company or an affiliate of the Company from Customers for the lease or sale of any multiplexing or similar equipment which is interconnected with or part of the "Building Network." The "Building Network" means optical line interface units, mutliplexers, cross-connect panels, digital access cross-connect systems ("DACS") and associated cabling, control systems and other equipment necessary to interconnect Customers to the System's Fiber.

(b) "Extraordinary Gross Revenue from Leases and Sales" means the amount, if any, by which Gross Revenue from Leases and Sales attributable to leasing and installment sales contracts exceeds four percent (4%) of the sum of (i) Gross Revenue from Leases and Sales plus (ii) the portion of Gross Revenue from Telecommunications Services which is described in clause (i) of paragraph (d) of this Section 1.14.

(c) "Ordinary Gross Revenue from Leases and Sales" means the amount by which Gross Revenue from Leases and Sales exceeds Extraordinary Gross Revenue from Leases and Sales.

(d) "Gross Revenue from Telecommunications Services" means the sum of (i) revenue, as determined in accordance with GAAP, which is received directly or indirectly by the Company or an affiliate of the Company from Customers, from the provision of Telecommunications Services provided over the System, plus (ii) all Extraordinary Gross Revenue from Leases and Sales.

(e) Gross Revenue from Leases and Sales and Gross Revenues from Telecommunications Services shall specifically include: (i) the fair market value of any barter transactions; (ii) the fair market value of willful cross subsidization of Customers (or Customers' affiliates) obtaining services from the Company's affiliates in locations outside of New York City; (iii) notwithstanding references to determinations in accordance with GAAP, all amounts charged to Customers passing on to said Customers costs allocable to the construction of facilities used to provide service being sold to said Customers, whether or not said amounts would be treated as revenue under GAAP; and (iv) all charges (including multiplexing and demultiplexing) for point to point private line services connecting two points within the Service Area and all access services that connect a Customer to the point of presence of another telecommunications provider.

(f) Gross Revenue from Telecommunications Services and Gross Revenue from Leases and Sales specifically shall not include: (i) any amounts charged to Customers which are paid by

the Company to another telecommunications system operator or owner not affiliated with the Company for any service the Company utilizes in connection with its provision of Services on the System; (ii) taxes imposed by law on Customers which the Company is obligated to collect; (iii) any investment income earned by the Company; (iv) the imputed fair market value for services provided for free and on a trial basis and other promotional offerings; (v) revenue from long distance services offered by the Company or its affiliates, provided that the Company has received the appropriate revenue from any access services provided over the System; and (vi) revenue from other business activities of the Company or its affiliates that are not specified in this Agreement.

(g) If the Company provides Telecommunications Services to an affiliate of the Company, including private line and access services, the Company shall be obligated to impose charges to the affiliate that are not less than the charges the Company would have imposed had the Telecommunications Services been provided to a non-affiliated company.

(h) No exclusions of compensation requirements in this Section shall limit the City's ability to require the Company or its affiliates to obtain such additional franchise or other authority to provide any services other than the Services

specifically authorized in this Agreement and impose specific compensation requirements as allowed by law.

1.21 "Harlem Backbone" means the Backbone from the Midtown Backbone to a location adjacent to the proposed International Trade Center in Harlem, depicted approximately on Appendix B-1.

1.22 "Initial Backbone" means the Midtown Backbone, Harlem Backbone and the Bronx Backbone, collectively, depicted approximately on Appendix B-1.

1.23 "Lower Manhattan Franchise Agreement" means the Franchise Agreement, between the City and the Company, effective May 1, 1990, which grants the Company the authority to install fiber optic telecommunications cable in Manhattan, south of Canal Street in an area that coincides with Community Board No. 1.

1.24 "Lower Manhattan Franchise Area" is the area within which the Company has authority to install fiber optic telecommunications cable pursuant to the Lower Manhattan Franchise Agreement. The Lower Manhattan Franchise Area coincides with Community Board No. 1.

1.25 "Midtown Backbone" means that portion of the Backbone located north of Canal Street and south of 62nd Street in Manhattan, depicted approximately on Appendices B-1 and B-2.

1.26 "Mayor" means the Chief Executive Officer of the City.

1.27 "Person" shall mean any natural person or any association, firm, partnership, joint venture, corporation, or other legally recognized entity, whether for-profit or not-for-profit, but shall not mean the City.

1.28 "Petition" means the petition submitted to the City by the Company on April 19, 1990.

1.29 "PSC" means the New York State Public Service Commission, or any successor thereto.

1.30 "Queens Backbone" means the Backbone from the Midtown Backbone to the Long Island Railroad Station at 5th Street and 53rd Avenue in Queens as depicted approximately on Appendix A.

1.31 "Queens Backbone Extension" means the extension of the Queens Backbone to a point adjacent to or in the immediate vicinity of the Queens Borough Hall in Kew Gardens, Queens.

1.32 "Service" or "Telecommunications Service(s)," means any non-switched telecommunications services within the Franchise Area authorized by the PSC and/or the FCC, except

"Cable Service." It does not include switched telecommunications services.

1.33 "Signal" means any transmission of radio frequency energy or of optical information.

1.34 "Streets" means the surface of, and the space above and below, any and all streets, avenues, highways, boulevards, concourses, driveways, bridges, tunnels, parks, parkways, waterways, docks, bulkheads, wharves, piers, public grounds or waters now or hereafter held by the City.

1.35 "System" means the Telecommunications System which is to be constructed, operated and maintained by the Company pursuant to this Agreement, including, without limitation, all real property and interests in real property, all tangible and intangible personal property, buildings, offices, furniture, Customer lists, cables, optical fibers, amplifiers and all other electronic devices, equipment and facilities used in connection therewith and all rights, contracts and understanding with regard to any matter related thereto, excluding the City Fiber. The Initial Backbone is part of the System.

1.36 "Telecommunications System" means any facility operating by means of optical fiber, coaxial cable, or other transmission lines or forms of transmission, and associated

equipment and devices, the primary purpose of which is to provide Telecommunications Service or the same service as Telecommunications Service.

SECTION 2 -- GRANT OF AUTHORITY

2.1 Term. This Agreement, and the franchise granted hereunder shall commence on the Effective Date and shall continue for a period of fifteen (15) years (the "Term"), unless sooner terminated (a) pursuant to a revocation of the franchise, as provided by Section 12.4 hereof, or (b) the cessation of the provision of Service on the System by the Company, in accordance with Section 12.5.4.

2.2 Closing.

2.2.1 Execution. This Agreement shall not be effective and the parties shall have no obligations hereunder until it is executed by the Mayor (herein referred to as the "Closing"). The date the Mayor executes this Agreement shall be the "Effective Date."

2.2.2 Conditions to Closing. As conditions to Closing, (a) the Board shall have adopted a resolution approving this Agreement, and (b) the Company's Board of Directors shall have adopted resolution(s) of the Company approving the

execution, delivery and performance of this Agreement and approving the execution, delivery and performance of all other documents, certificates and other instruments required to be furnished to the City by and pursuant to the terms of this Agreement.

2.2.3 Deliveries. Prior to the Closing, the Director and the Company shall have a pre-closing (the "Pre-Closing"). At the pre-closing, (a) the Company shall deliver to the City: (i) evidence that it has deposited with the Comptroller the Security Fund required pursuant to Section 12.2 hereof, (ii) a certificate of liability insurance policy, pursuant to Section 11.2 hereof, with a copy to the Comptroller and the Director, (iii) an opinion of the Company's counsel dated as of the date a duly authorized officer of the Company executes this Agreement, stating that this Agreement has been duly authorized, executed and delivered by the Company and, upon the Closing shall be a binding obligation of the Company; and (iv) an original of this Agreement, executed by a duly authorized officer of the Company; and

(b) the City shall deliver to the Company: (i) a certified copy of the Resolution of the Board of Estimate approving the grant of this franchise, and (ii) an opinion of the Corporation Counsel, dated the date of the Pre-closing, stating that this Agreement has been duly authorized, and that upon its

execution by the Mayor, it shall be duly executed and delivered by the City and it is a binding obligation of the City.

2.3 Nature of Franchise, Effect of Termination, and Renewal of Franchise.

2.3.1 Nature of Franchise. The City hereby grants the Company, subject to the terms and conditions of this Agreement, the nonexclusive franchise providing the right and consent to install fiber optic telecommunications cable and related equipment and facilities in the Streets within the Franchise Area to provide only Telecommunications Services.

2.3.2 Effect of Termination. Upon termination of this Agreement, all of the parties' rights and obligations hereunder shall terminate, except as otherwise expressly provided in this Agreement. The termination of this Agreement, for any reason, shall not operate as a waiver or release of any obligation of the Company for any liability which arose or arises out of any act or failure to act required hereunder prior to the termination, which exists pursuant to Sections 8, "Compensation," 9.6.2, "Right of Inspection," and 14.17, "Claims under Agreement" hereof. The Company shall maintain the Security Fund and insurance as required in Sections 12.2.5 and 12.6.1(d).

2.3.3 Renewal. The City shall negotiate, in good faith, a renewal of this Agreement and the franchise granted hereunder. Notwithstanding any such negotiations, the Board is not hereby obligated to renew this Agreement or the franchise.

2.4 Conditions and Limitations on Franchise

2.4.1 Not Exclusive. Nothing in this Agreement shall affect the right of the City to grant to any Person a franchise, consent, or right to occupy and use the Streets, or any part thereof, for the construction, operation, or maintenance of all or any part of a Telecommunications System within the Franchise Area or elsewhere in the City or for any other purpose.

2.4.2 Expansion of System. (a) The Company is authorized to install fiber optic telecommunications cable at any location in the Streets within the Franchise Area at any time during the Term, without the approval of the Director or the Board.

(b) If at any time during the Term, the Company wants to install Backbone Fiber in the Streets for the System, in addition to the Initial Backbone, it agrees to notify the Director of the location of the proposed installation and to consult with the Director concerning its location.

2.4.3 Backbone Installation Schedule.

(a) The Company agrees to commence installation of the Midtown Backbone for the System, along a route approximately depicted in Appendix B-2, as soon as feasible after the Effective Date. (The date the Company commences installation of the Midtown Backbone shall be the "Commencement Date.") The Company agrees to substantially complete the installation of the Midtown Backbone within twelve (12) months after the Commencement Date.

(b) The Company agrees to commence installation of the Harlem Backbone within twelve (12) months after the Commencement Date. It agrees to substantially complete the installation of the Harlem Backbone within eighteen (18) months after the Commencement Date.

(c) (i) The Company agrees to commence installation of the Bronx Backbone within eighteen (18) months after the Commencement Date. It agrees to substantially complete the installation of the Bronx Backbone within twenty-four (24) months after the Commencement Date.

(ii) The Company agrees to install a drop cable ("Drop Cable") in the Bronx County Courthouse within twenty-four (24) months after the Commencement Date.

(d) (i) The Company agrees to commence and to substantially complete the installation of the Brooklyn Backbone by December 31, 1992.

(ii) The Company agrees to install a Drop Cable in the Brooklyn Borough Hall and a Drop Cable in the Brooklyn Municipal Building by December 31, 1992.

(d) The Company agrees to commence and to substantially complete the installation of the Queens Backbone by December 31, 1992.

(e) (i) The Company agrees to substantially complete the installation of the Queens Backbone Extension within twelve (12) months after the Borough President of Queens requests, in writing, that the Company make such installation, provided the request is not made prior to December 31, 1992.

(ii) The Company shall not be obligated to install the Queens Backbone Extension if, in lieu thereof, the Company deposits Six Hundred Thousand (\$600,000) Dollars in the "Telecommunications Fund," as defined in Section 8.1.1(b)(iii) hereof, which amount shall be used exclusively for the City's telecommunications needs in the Borough of Queens.

(f) The Director shall cooperate with the Company in its efforts to secure the rights of way necessary to construct the Brooklyn Backbone and the Queens Backbone. Nothing contained in this Section shall be deemed in any way to relieve the Company of its obligation to construct the Brooklyn Backbone or the Queens Backbone.

2.4.4 Public Works and Improvements. Nothing in this Agreement shall abrogate the right of the City to perform any public works or public improvements of any description, including, without limitation, all work authorized by the New York State Rapid Transit Law. In the event that the System interferes with the construction, operation, maintenance, or repair of such public works or public improvements, the Company shall, at its own cost and expense, promptly protect or alter or relocate the System, or any part thereof, as directed by the City. In the event that the Company refuses or neglects to so protect, alter, or relocate all or part of the System, the City shall have the right to break through, remove, alter, or relocate all or any part of the System without any liability to the Company and the Company shall pay to the City the costs incurred by such breaking through, removal, alteration, or relocation.

2.4.5 No Waiver. Nothing in this Agreement shall be construed as a waiver of any codes or ordinances of the City or of the City's right to require the Company to secure the

appropriate permits or authorizations for such use, provided that no fee or charge may be imposed upon the Company for any such permit or authorization, other than the standard fees or charges generally applicable to all Persons for such permits or authorizations, and any such standard fee or charge shall not be an offset against the compensation the Company is required to pay to the City pursuant to Section 8 of this Agreement.

2.4.6 No Release. Nothing in this Agreement shall be construed as a waiver or release of the rights of the City in and to the Streets. In the event that all or part of the Streets within the District are eliminated, discontinued, closed and demapped, all rights and privileges granted pursuant to this Agreement with respect to said Streets, or any part thereof so eliminated, discontinued, closed, and demapped, shall cease upon the date of the final adoption of a resolution by the Board eliminating, discontinuing, closing and demapping said Streets, or the effective date of such final adoption, whichever is later, provided that, if said elimination, discontinuance, closing and demapping of any Street is undertaken for the benefit of any private Person, the Board shall make reasonable efforts to condition its consent to said elimination, discontinuance, closing and demapping of said Street on the agreement of said private Person to (i) grant the Company the right to continue to occupy and use said Street, or (ii) reimburse the Company for the reasonable costs of relocating the affected part of the System.

SECTION 3 -- SERVICE

3.1 No Interference. In the operation of the System, the Company shall not interfere with the technical operation of any other communications system within any building or within the Streets.

3.2 No Monopoly. If, at any time during the term, it is finally determined by a court of competent jurisdiction that the distribution or provision of any Service by the Company, or any other action in connection with the operation of the System, has tended to create or has created a monopoly or a restraint of trade in violation of law, such determination shall be deemed to be a material breach of this Agreement. In such event, in addition to pursuing any of the actions set forth in Section 12.4 hereof, the Board may issue a directive to correct such conditions, consistent with this Agreement and the determination of the court, without following the procedural requirements of Sections 12.4.3 and 12.4.4 hereof.

3.3 No Discrimination. The Company shall not discriminate in the provision of its Service on the basis of race, creed, color, national origin, sex, age, handicap, marital status, or real or perceived sexual orientation.

3.4 Obligation to Market and to Consult. The Company agrees to market its Telecommunications Services throughout the Franchise Area aggressively throughout the term of this Agreement. The Company agrees to cooperate with the New York City Office for Economic Development and the Director of Economic Development for each borough in the Franchise Area (or such other official for economic development designated by the Borough President of such borough) to identify opportunities for the use of the System in the Franchise Area.

SECTION 4 -- SERVICES TO CITY

4.1 Company's Obligation. The Company shall maintain the City Fiber, as further provided in Appendix C to this Agreement. The Company shall comply fully with all requirements and provisions of such Appendix C.

4.2 Continuous Service. In the event the Company, with consent of the City, sells or otherwise transfers the System or Control thereof, to any Person, the City, or the City's assignee or in the event the franchise terminates, the Company shall transfer the System in an orderly manner in order to maintain continuity of Service, if any, to the City and to other Customers.

4.3 Additional Service.

4.3.1 Discount. The Company shall make available to the City such Service over the System and the City Fiber as the City may require at the lower of (a) 75 percent of the lowest rate it charges to other Customers for comparable service with a comparable volume or (b) the tariff rate for such service, subject to Section 4.3.2.

4.3.2 Limitation on Service. (a) The Company will have no obligation to provide Service to any City Customer if the provision of such Service would be Economically Unfeasible, as defined below.

(b) "Economically Unfeasible" means that the provision of such Service would result in a rate of return on the direct marginal cost of labor and material for the "Drop Cables," as defined in Section 8.1.1.b(iii)(x), and the electronics to the City Building or City Customer that is less than (i) the rate of return authorized for the local exchange carrier by the appropriate regulatory agency (the FCC or the PSC) or, (ii) if there is no authorized rate of return, twelve (12%) percent.

4.3.3 Prompt Service. In the event the City elects to purchase Service from the Company, the Company agrees to serve the City as promptly as it serves other Customers.

4.3.4 Cooperation. The Company agrees to cooperate with other companies that serve the City to provide the interconnects with their communications systems including their Telecommunications Systems.

4.4 Noncompetition. The City agrees not to use the City Fiber or any portion thereof to provide Service to any Person in direct competition with the Company's Service. The City may, however, provide service to the City or any City-related entity.

SECTION 5 -- TARIFF FILINGS

5.1 PSC Tariffs. The Company shall promptly file with the Director all and any tariffs or tariff applications, and all amendments or modifications thereof, that the Company is required to file with the PSC.

SECTION 6 -- CONSTRUCTION AND TECHNICAL REQUIREMENTS

6.1 General Requirement. The Company agrees to comply with each of the terms set forth in this Section 6 governing construction and technical requirements for its System and the City Fiber, in addition to any other reasonable requirements or procedures specified by the Director, and any requirements of Empire City Subway (Ltd.).